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Habitat and Harvest: The Modern Scope of Tribal Treaty Rights to Hunt and Fish

Cover Page Footnote

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HABITAT AND HARVEST: THE MODERN SCOPE OF TRIBAL TREATY RIGHTS TO HUNT AND FISH

Whitney Angell Leonard*

INTRODUCTION

For the first century of its existence, the United States government dealt with Indian nations¹ the way it would deal with any other sovereign nation: through treaty. And a century of Uncle Sam's highly active treaty-making yielded a lot of promises: between 1778 and 1871, the United States ratified 370 treaties with Indian nations and negotiated at least 45 more that were not ultimately considered for ratification.² These treaties were the instrument by which Native tribes were convinced to sign away the overwhelming majority of their lands, retaining only relatively small "reservations" on which they were told to live.³ In exchange for these vast land cessions, the United States provided promises that the United States government would protect the tribes, provide certain basic services, and, in many cases, recognize the tribes' continued right to hunt, fish, and gather in their traditional territories outside the boundaries of their newly created reservations.

Tribes' struggle for full recognition of the rights guaranteed by these treaties has persisted ever since. Treaty-guaranteed rights to hunt and fish have been—and remain—a hotly contested element of this struggle. Fishing rights, in

* This is going to be about her!

¹ Notwithstanding Christopher Columbus's original mistake in calling Native Americans "Indians," today the term is generally accepted and is widely used in federal Indian law and other contexts. In this article I use the term "Indian," as well as "Native nation," and "tribe" to describe the Native peoples who inhabited North America before the arrival of Europeans, and who continue to inhabit it today, making up approximately one percent of the U.S. population. See *State & County QuickFacts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Oct. 27, 2014).

² *An Introduction to Indian Nations in the United States*, NAT'L CONGRESS AM. INDIANS 10 (date unavailable), http://www.ncai.org/about-tribes/Indians_101.pdf.

³ By the end of treaty-making and the later land "allotment" period, Native tribes in the contiguous 48 states would eventually retain just 56 million acres out of the 1.9-billion-acre land mass they had once controlled. A BRIEF INTRODUCTION TO TRIBAL NATIONS IN THE UNITED STATES, NAT'L CONGRESS AM. INDIANS 5 (2013).

particular, have generated decades of litigation over the scope of the reserved right, including the important question of whether it includes an implied right to an abundant fishery, necessitating habitat protection measures and restrictions on non-tribal fishing activity.

This article focuses on the less frequently analyzed treaty hunting rights, which were typically guaranteed through the same treaty language as fishing rights. By comparing hunting rights to fishing rights, the article argues that courts can and should find an implied right of habitat protection in the hunting context, as in the fishing context. It suggests that the realization of an implied right to habitat protection has been limited in the hunting context because these rights have been typically—but incorrectly—perceived as negative rights (i.e., the right to prevent further habitat destruction rather than the affirmative right to restore or expand available habitat). The article then considers both consultative processes and affirmative litigation as ways to realize the as-yet-underdeveloped right to habitat protection. Stronger recognition of this right will help tribes vindicate their treaty-guaranteed rights and restore access to culturally and nutritionally important hunting opportunities, and will also help protect the viability of wildlife populations that have shrunk dramatically in the face of settlement and development pressures.

* * *

Thanks to the Supremacy Clause of the United States Constitution, the hundreds of treaties signed by tribal leaders in the late nineteenth century became—and remain—“the supreme Law of the Land.”⁴ The United States government is therefore still bound by the promises reflected in these treaties. But, as many commentators have noted, broken promises have proven all too frequent.⁵ John Collier, the Commissioner of Indian Affairs in the 1930s, said in

⁴ This includes the 370 treaties that were ratified by Congress as well as some that were not ratified but were determined by the U.S. Court of Claims to have taken legal effect. *NAT’L CONGRESS AM. INDIANS*, *supra* note 2, at 10.

⁵ See, e.g., Byron L. Dorgan, *Broken Promises*, N.Y. TIMES, July 10, 2013, <http://www.nytimes.com/2013/07/11/opinion/broken-promises.html> (former Senator and Congressman noting that “our country has left a trail of broken promises to American Indians”); Daniel Garza, *Under the Reservation Sky*, INDIAN COUNTRY TODAY, Oct. 12, 2012, <http://indiancountrytodaymedianetwork.com/2012/10/12/under-reservation-sky> (describing tribes that have “endured years of broken promises and failed policies resulting from their treaty agreements with the United States government”); Tracie White, *Broken promises: The state of health care on Native American reservations*, SCOPE (Nov. 4, 2013), <http://scopeblog.stanford.edu/2013/11/04/broken-promises-the-state-of-health-care-on-native-american-reservations> (detailing the failure of the U.S. government to provide adequate health care services to Native communities).

1938: “We took away their best lands; broke treaties, promises; tossed them the most nearly worthless scraps of a continent that had once been wholly theirs.”⁶ Begun in the nineteenth century, the struggle to hold the United States accountable for those broken promises has continued into the twenty-first. Tribes’ battle for full recognition of their reserved rights to hunting and fishing is one evolving chapter of that struggle.

While specific language varied by treaty, many tribes reserved usufructuary rights to their aboriginal territories—that is, they retained the right to continue using those lands for hunting, fishing, and gathering, though they no longer retained the right of ownership or occupancy. Many treaties with tribes in the Northwest region of the United States, often known as the “Stevens Treaties” after Governor Isaac Stevens who negotiated them, have clear language guaranteeing these rights in perpetuity to the respective tribes.⁷ As this article will explore further, treaty rights to hunting and fishing are understood as a property right requiring just compensation if taken from the tribes.⁸

Nonetheless, after tribes were forced onto reservations in the second half of the nineteenth century, their usufructuary rights to the lands they had just ceded were honored only sporadically, if at all. But in the second half of the twentieth century, as early as the 1950s and gaining force in the 1960s and 1970s, tribes began asserting their hunting and fishing rights more strongly, conducting “fish-ins” in Washington state⁹ and demanding recognition of their rights in the courts.¹⁰ This approach, and opposition from non-Native fishermen,

⁶ U.S. DEP’T OF THE INTERIOR, ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDING JUNE 30, 1938, at 209 (1938), *available at* <https://archive.org/stream/annualreportofse8231unit#page/n1/mode/2up> (last visited Oct. 27, 2014).

⁷ See, e.g., Treaty between the United States and the Flathead, Kootenay, and Upper Pend d’Oreilles Indians [Treaty of Hellgate], July 16, 1855, art. 3, 12 Stat. 975, 976; Treaty between the United States of America and the Nez Percé Indians [Nez Perce Treaty], June 11, 1855, art. 3, 12 Stat. 957, 958; Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla tribes and bands of Indians in Washington and Oregon Territories [Umatilla Treaty], June 9, 1855, art. 1, 12 Stat. 945, 946; Treaty between the United States and the Yakama Nation of Indians [Yakama Treaty], June 9, 1855, art. 3, 12 Stat. 951, 953.

⁸ See *infra* Section II.B.

⁹ Angelique EagleWoman (Wambdi A. WasteWin), *Tribal Hunting and Fishing Lifeways & Tribal-State Relations in Idaho*, 46 IDAHO L. REV. 81, 102 (2009).

¹⁰ See, e.g., *Puyallup Tribe v. Dep’t of Game of Wash. (Puyallup I)*, 391 U.S. 392 (1968) (tribe asserting rights to fish at the “usual and accustomed places” under the Stevens Treaties); *State v. Arthur*, 261 P.2d 135 (Idaho 1953) (tribe arguing that tribal members had a right to hunt on U.S. Forest Service land as “open and unclaimed” lands under the Nez Perce Treaty).

hunters, and state fish and game agencies, has led to decades of court battles, particularly around fishing rights. The Puyallup tribe, for instance, took its fishing rights to the Supreme Court three times between 1968 and 1977.¹¹ These court battles ultimately led to relatively strong affirmation of tribal treaty rights as a continuing right to hunt and fish off-reservation, which must be recognized and upheld by federal and state governments.¹²

Moreover, the successive waves of litigation also led to a general consensus, if not a clear Supreme Court holding, that the treaty right to fish in “the usual and accustomed places” contains some component of protection for harvestable fish populations and for the habitat needed to sustain those populations.¹³ As Justice Stevens famously held, the tribal treaty right to fish must consist of something more than a right for tribal members “occasionally to dip their nets into the territorial waters.”¹⁴

Through this recognition of an implied right to protection of habitat and fish populations, Native tribes in the Pacific Northwest have been able to wield their treaty rights to guarantee access to a certain portion of harvestable salmon runs¹⁵ and halt dams and other projects that would harm river habitat and endanger salmon populations.¹⁶ Because of the nature of the proposed projects threatening salmon habitat, the implied right of habitat protection has generally been applied as a negative right—the right to enjoin further destruction of habitat—though the right is not inherently limited in this way. Scholars examining treaty fishing rights have argued that the implied right to habitat protection is an essential piece of the treaty right.¹⁷ Under the “bundle of sticks” view of property

¹¹ *Puyallup I*, 391 U.S. 392 (1968); *Dep’t of Game of Wash. v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe, Inc. v. Dep’t of Game of State of Wash. (Puyallup III)*, 433 U.S. 165 (1977).

¹² See *Puyallup I*, 391 U.S. 392 (1968) (affirming tribe’s assertion of rights to fish at the “usual and accustomed” sites along the Columbia River).

¹³ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n (Fishing Vessel)*, 443 U.S. 658, *modified sub nom.* *Washington v. United States*, 444 U.S. 816 (1979) (recognizing that the tribal fishing right included something more than just the right to *attempt* to harvest fish).

¹⁴ *Fishing Vessel*, 443 U.S. at 679.

¹⁵ See *id.* (holding that the Stevens Treaties entitled the relevant tribes to an opportunity to take up to fifty percent of the annual salmon harvest).

¹⁶ E.g., *Confederated Tribes of the Umatilla Indian Reservation v. Alexander* (the “Catherine Creek Dam” case), 440 F. Supp. 553 (D. Or. 1977); *Confederated Tribes of the Umatilla Indian Reservation v. Callaway* (the “Peaking Power” case), Civ. No. 72-211 (D. Or. Aug. 17, 1973).

¹⁷ See Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407 (1998) (arguing

rights, in which property rights are understood as a combined bundle of component rights, habitat protection and the guaranteed existence of a fishable population may be seen as “sticks” in the sub-bundle of usufructuary rights.

Hunting rights, however, have evolved quite differently. With the exception of scattered cases litigated on an individual basis, there has been much less litigation of treaty hunting rights as compared to fishing rights.¹⁸ As such, there has been somewhat less active assertion of the implied right of habitat protection for hunted species. Yet treaty rights to hunt and to fish are understood to be of the same nature.¹⁹ That the assertion and recognition of hunting rights has proceeded differently from the recognition of fishing rights is, therefore, somewhat of a paradox.

In areas where big-game species like deer and elk are still available in relatively abundant populations, it makes intuitive sense that tribal hunting rights would be less contentious than rights to harvest endangered salmon. Where the resource is not particularly scarce, there is less reason to fight over it. But surely there are projects that would harm big-game habitat and threaten ungulate populations—such as large-scale logging on National Forest lands, to take one simple example—and yet these projects do not face the same litigation in the name of tribal treaty rights that new dam projects face. Even more strikingly, there are some big-game populations that are indeed scarce—such as bighorn sheep and wild bison—and these species, too, have largely escaped the type of litigation that surrounds wild salmon.

that the property interest in treaty fishing rights includes a right to access historic tribal fishing sites and a right to have sufficient fish to provide the tribes with a moderate living); Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 167 (1996) (“The Stevens treaties may have created an implied right to protection of fish habitat conditions essential to the preservation of the tribes’ fisheries.”); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting A Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 Vt. L. Rev. 355, 359 (2001) (arguing that treaties created a “native conservation servitude that encumbers ceded lands,” imposing habitat protection requirements).

¹⁸ Cf. *State v. Buchanan*, 978 P.2d 1070 (Wash. 1999) (holding that tribal members had a right to hunt on “open and unclaimed” lands, and that state-owned wildlife area may be considered part of tribe’s aboriginal hunting grounds); *State v. Cutler*, 708 P.2d 853 (Idaho 1985) (holding that treaty hunting rights do not extend to state-owned land); *State v. Stasso*, 563 P.2d 562 (Mont. 1977) (holding that tribal members had a right to hunt free from state regulation on open and unclaimed federal lands).

¹⁹ See Bradley I. Nye, Comment, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175, 187 (1992) (explaining that the reserved rights doctrine supports the idea that tribes were reserving their equal right to fish and hunt on ceded lands).

Importantly, this lack of litigation helps avoid the erosion of goodwill that has plagued fisheries management. But it also means that there has been less of an opportunity for tribes to assert—and courts to consider—the implied right of habitat and population protection for species hunted under treaty rights. Bison hunting in the Greater Yellowstone Area (GYA) presents an interesting illustration of the paradox in which hunting rights are trapped. Wild bison have lost more than ninety-nine percent of the habitat they once roamed, with the only continuously wild herd now occupying Yellowstone National Park and small patches of habitat outside the Park. This habitat is not threatened by any new development proposals, which would lend themselves to the kind of negative-right application of treaty rights that have succeeded in stopping habitat destruction in the fishing context. What Yellowstone bison need in order to thrive is affirmative expansion of habitat. This means that tribes need the affirmative right to compel bison habitat and population gains, which would bring bison harvests closer to the historical numbers contemplated at the time of treaty negotiations. If the right to habitat protection were conceived exclusively as a negative right, it would be useless for a species like the bison that has already lost almost all its habitat, paradoxically making the right least useful in cases where it is most necessary. But it need not be so.

This article uses the case study of Yellowstone bison to argue that the implied right of habitat protection applies to treaty hunting rights as well as fishing rights, and that it must be interpreted to include an affirmative right as well as a negative right. The article begins, in Part I, by providing an overview of Native treaty rights in general, followed by a more detailed discussion of the Native property interest in hunting and fishing rights. Part II then traces the evolution of modern treaty fishing rights and explores how these rights have been leveraged to enjoin activities that would harm fish habitat. Part III details the somewhat distinct evolution of treaty hunting rights, using the example of Yellowstone bison to argue that hunting rights similarly include an implied right to habitat protection, and that they must also be interpreted to include an affirmative right to protect big-game habitat. The article proposes that this affirmative right could be applied through consultative processes, but that if these processes fail, affirmative litigation may be a viable strategy for tribes seeking to vindicate their treaty hunting rights.

I. PROMISES AND PROPERTY INTERESTS: AN OVERVIEW OF NATIVE TREATY RIGHTS

A. *Uncle Sam's Promises*

In the 370 treaties that the United States executed with hundreds of Native Tribes between 1778 and 1871, the federal government guaranteed specific sets of rights, benefits and conditions.²⁰ The language differed across treaties, but the United States generally agreed to protect the treaty-making tribe and provide basic services, like health care and education, in exchange for the tribes' cession of millions of acres of land.²¹ Except for tribes in Oklahoma and Alaska,²² these treaties also generally reserved a relatively small homeland "reservation" for each tribe—or confederations of tribes grouped together somewhat haphazardly by the United States government²³—and sometimes also guaranteed tribes the continued right to hunt and fish in their aboriginal territories.

Negotiated under circumstances that can at best be called imbalanced (and have more often been called coercive or even fraudulent²⁴), treaties with tribal nations have been subject to centuries of dispute regarding their proper interpretation. Through successive rounds of litigation and shifting government policies, canons of Indian treaty construction have developed. *Cohen's Handbook of Federal Indian Law*, a widely accepted and respected source, summarizes the canons of construction:

The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in

²⁰ NCAI, *supra* note 2, at 10.

²¹ *Frequently Asked Questions*, BUREAU INDIAN AFF., U.S. DEP'T INTERIOR, <http://www.bia.gov/FAQs> (last visited Nov. 22, 2013).

²² Tribes in Oklahoma and Alaska (with one exception) do not have reservations. Because this article focuses on tribal reserved treaty rights to hunt and fish, it focuses on tribes that ceded land by treaty while reserving homeland reservations and off-reservation usufructuary rights.

²³ These include the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana, the Confederated Tribes of the Umatilla Indian Reservation, the Mandan, Hidatsa, and Arikari Nation (Three Affiliated Tribes of Fort Berthold Reservation), the Shoshone-Bannock Tribes (Fort Hall Reservation), to name just a few. In some cases, such as the Northern Arapaho and Eastern Shoshone Tribes of the Wind River Indian Reservation, historically antagonistic tribes were forced to share a reservation.

²⁴ See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 32, § 1.03[1] (2005); EagleWoman (Wambdi A. WasteWin), *supra* note 9, at 87, 91. In many ways, the wildly lopsided bargaining power and standardized treaty terms resemble contracts of adhesion more than treaties negotiated by two equal sovereigns.

favor of the Indians; and all ambiguities are to be resolved in favor of the Indians. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.²⁵

These canons of construction essentially represent an ex-post effort to reduce the effects of lopsided bargaining power and possible misunderstandings at the time of treaty negotiation. Another important interpretive tool working in favor of Indian nations is the "reserved rights doctrine" that first emerged in the 1905 case *United States v. Winans*.²⁶ In *Winans*, the Supreme Court held that the treaty between the United States and the Yakama Indians "was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted."²⁷ The court went on to add that although the treaty "negotiations were with the tribe[,] . . . [t]hey reserved rights . . . to every individual Indian, as though named therein."²⁸ This landmark decision has been followed and reaffirmed in more modern times,²⁹ and it forms the basis for the understanding that any rights not explicitly ceded by treaty are still held by the signatory Native nation or nations, and may be exercised by individual members of those nations.

Apart from land cessions and reserved rights, the federal government's guarantees that it would protect the tribes and provide essential services have formed the basis of the enduring (though not always fulfilled) "trust relationship" between the United States government and Native nations.³⁰ Since Chief Justice Marshall's initial characterization of Indian nations as "domestic dependent nations,"³¹ the Supreme Court has concretized the idea of the trust responsibility to Native tribes as an exacting fiduciary relationship:

[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes the Government is

²⁵ COHEN'S HANDBOOK, *supra* note 24, at 119-20, § 2.02[1] (internal footnotes omitted).

²⁶ *United States v. Winans*, 198 U.S. 371 (1905).

²⁷ *Winans*, 198 U.S. at 381. Contrary to the Court's spelling, "Yakama" is the spelling used by the modern Yakama Nation and was also used in the Yakama Treaty of 1855.

²⁸ *Id.*

²⁹ *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

³⁰ BUREAU INDIAN AFF., *supra* note 21.

³¹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.³²

This means that the United States government has an affirmative duty to protect Native nations, and there is “no doubt . . . that the government’s trust responsibility extends to the protection of treaty rights.”³³ In addition to honoring tribes’ treaty rights, therefore, the United States government also has an affirmative duty to protect these rights and uphold them against attack or diminishment by state governments.

Treaties signed between the United States and Native tribes were understood as treaties between sovereign nations, and they remain so today. As the canons of construction indicate, treaties ratified by the United States retain their force as the “supreme Law of the Land”³⁴ (unless they have been explicitly abrogated by Congress³⁵) and federally recognized Indian nations retain their status as sovereign governments. Most Indian nations will be quick to point this out.³⁶ Sherman Alexie’s characters in *Smoke Signals* wittily highlighted the two-sovereign issue from the perspective of tribal members leaving their reservation:

Velma: You guys got your passports?

Thomas Builds-the-Fire: Passports?

Velma: Yeah, you’re leavin’ the rez and goin’ into a whole different country, cousin.

Thomas Builds-the-Fire: But... but, it’s the United States.

Lucy: Damn right it is! That’s as foreign as it gets. Hope you two got your vaccinations!³⁷

³² *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

³³ *Klamath Tribes v. U.S. Forest Service*, 1996 WL 924509, at *20, Civil No. 96-381-HA (D. Or. 1996).

³⁴ U.S. CONST. art. VI.

³⁵ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

³⁶ See *IN THE NAME OF THE SALISH AND KOOTENAI NATION 2* (Robert Bigart & Clarence Woodcock eds., 1996) (“As most Indian people on the reservation are careful to point out, the treaty represents an agreement entered into by two sovereign parties.”).

³⁷ *SMOKE SIGNALS* (Miramax Films 1998).

Yet despite the enduring importance of tribal sovereignty for Indian peoples, others do not always fully understand the nature of tribal sovereignty, let alone tribal treaty rights—perhaps sowing the seeds of conflict over tribal reserved rights to hunt and fish.

B. The Native Property Interest in Usufructuary Rights

Properly understood, treaty provisions guaranteeing tribes the right to hunt, fish, and gather off-reservation in perpetuity reserved to those tribes a property interest in their continued right to carry out these activities. This right has been most aptly described as a *profit à prendre*, the property law right to enter another person or entity's property and remove or extract a resource.³⁸ Examining the specific language from treaties reserving usufructuary rights is instructive in understanding this analysis.

Although each treaty was unique, the general terms for commonly guaranteed rights tend to take similar forms and use similar language, and thus the language in different treaties can sometimes be analyzed under the same rubric. In particular, many of the treaties negotiated by Governor Isaac I. Stevens with Native tribes in the Pacific Northwest contain fairly similar language guaranteeing off-reservation hunting rights, and courts have tended to analyze these “Stevens Treaties” similarly.³⁹ This article therefore focuses on the Stevens Treaties, and the tribes that signed them, in analyzing the nature of the property interest in usufructuary rights.

Isaac I. Stevens was Governor of the Washington Territory—which then included part of Idaho and Western Montana—from 1853 to 1857, during which time he negotiated numerous treaties with tribes in the region. The treaty that Stevens signed with the Nez Perce Tribe of Idaho in June, 1855, contains fairly

³⁸ See, e.g., Blumm & Swift, *supra* note 17, at 445-46; Michael R. Newhouse, Note, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The Mille Lacs Case*, 21 PUB. LAND & RESOURCES L. REV. 169, 193 (2000); Brian J. Perron, Note, *When Tribal Treaty Fishing Rights Become A Mere Opportunity to Dip One's Net into the Water and Pull It Out Empty: The Case for Money Damages When Treaty-Reserved Fish Habitat Is Degraded*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 783, 814 (2001).

³⁹ E.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 n.21, *modified sub nom.* *Washington v. United States*, 444 U.S. 816 (1979) (analyzing together the treaties of multiple tribes in Washington state, and noting that “[i]dentical, or almost identical, language is included in each of the . . . treaties”).

typical Stevens Treaty language guaranteeing the tribes the right to exercise usufructuary rights on the lands they were ceding:

The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.⁴⁰

The Yakama Treaty negotiated and signed between Governor Isaac Stevens and the Yakama Nation, also in June, 1855, contains identical language,⁴¹ and the Treaty of Hellgate negotiated and signed between Stevens and the Flathead, Kootenay, and Upper Pend d'Oreilles tribes (now the Confederated Salish and Kootenai Tribes) just one month later, in July, 1855, also contains nearly identical language guaranteeing the same hunting and fishing rights.⁴² The treaty that Governor Stevens negotiated and signed with the Umatilla, Walla Walla, & Cayuse tribes (now the Confederated Tribes of the Umatilla Reservation) in June, 1855, shows how other Stevens Treaties provided an essentially identical guarantee of rights despite slightly differing language:

Provided, also, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.⁴³

Moreover, evidence regarding the negotiation of these treaties shows that the retention of usufructuary rights was a key element of the tribes' willingness to agree to the treaties. As scholars have noted, tribes like the Nez Perce insisted on maintaining access to their traditional hunting and fishing grounds, and

⁴⁰ Nez Perce Treaty, *supra* note 7, art. 3.

⁴¹ Yakama Treaty, *supra* note 7, art. 3.

⁴² Treaty of Hellgate, *supra* note 7, art. 3.

⁴³ Umatilla Treaty, *supra* note 7, art. 1.

Governor Stevens repeatedly assured them that they would retain this right.⁴⁴ As recorded in the official proceedings of the Hell Gate Treaty Council with leaders of the Salish, Kootenai, and Upper Pend d'Oreilles, Governor Stevens assured the tribes four separate times that the treaty guaranteed them the right to hunt, fish, gather, and pasture animals on any ceded lands not occupied by white settlers.⁴⁵ Governor Stevens also tried to convince those tribes to accept a particular location for their reservation by telling them that it was "more convenient for buffalo," indicating that access to off-reservation hunting grounds was a key piece of the land cession deal.⁴⁶

By some accounts, the tribes' primary motivation for entering into negotiations with Stevens was securing access to hunting grounds: Robert Bigart, director of the Salish Kootenai College Press, has said that the Salish, Kootenai, and Upper Pend d'Oreilles "thought they would talk about arranging peaceful access to the buffalo herds" and obtaining protection from the United States Government against the Blackfoot Tribe. "But Stevens was there to get the Indians onto a reservation and open up a transportation route to the West."⁴⁷

Finally, the price paid to tribes for cession of their lands was nearly always wildly below market value. The Confederated Salish and Kootenai Tribes, for instance, were compensated for just eleven percent of the market value of their lands, receiving \$593,377.82 for the lands that the Indian Claims Commission later determined had been worth \$5,300,000 in 1859.⁴⁸ This glaring price discrepancy indicates, of course, that the United States may not have been negotiating in good faith. But the fact that the Tribes were willing to accept such a low price for their land could potentially also indicate—in addition to the fact that they were not in a good position to assess the market value of their lands—that they believed they were retaining significant rights in the lands they were ceding.

⁴⁴ Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 440-41 (1998).

⁴⁵ OFFICIAL PROCEEDINGS AT THE COUNCIL HELD BY GOVERNOR ISAAC I. STEVENS, SUPT. INDIAN AFFAIRS, W.T., WITH THE FLATHEAD, PEND OREILLES AND KOOTENAY TRIBES OF INDIANS AT HELL GATE IN THE BITTER ROOT VALLEY, WASHINGTON TERRITORY, COMMENCING ON THE SEVENTH DAY OF JULY, 1855, *reprinted in* IN THE NAME OF THE SALISH AND KOOTENAI NATION 21, 24, 25, 47, 50 (Robert Bigart & Clarence Woodcock eds., 1996).

⁴⁶ *Id.* at 42.

⁴⁷ Daryl Gadbow, *The Treaty Lives On: Council Grove State Park commemorates "the place of tall trees with no limbs," where Indian tribes reluctantly gave up most of their homeland 150 years ago*, MONTANA OUTDOORS, Nov.-Dec. 2005, *available at* <http://fwp.mt.gov/mtoutdoors/HTML/articles/2005/CouncilGrove.htm> (last visited Oct. 27, 2014).

⁴⁸ IN THE NAME OF THE SALISH AND KOOTENAI NATION, *supra* note 36, at 149-50.

The retention of usufructuary hunting and fishing rights, therefore, was more than just a standard provision inserted into treaties of adhesion. Rather, it was a key piece of the deal that may have helped convince tribes to cede their ownership and occupancy rights to the lands they had inhabited for millennia.

As noted earlier, the usufructuary rights retained by tribes represent a profit à prendre in property law terms, often known simply as a profit. The Third Restatement of Property defines a profit à prendre as “an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another.”⁴⁹ Like easements in general, a profit à prendre is considered a concrete property interest: “[t]he benefit of an easement or profit is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose.”⁵⁰ Native tribes holding usufructuary rights therefore have the right to enter ceded lands within their aboriginal territories, engage in hunting and fishing activities, and take the spoils of their harvest. As the Supreme Court recognized as early as *Winans*, the tribal property interest in hunting and fishing rights creates a servitude on the ceded lands.⁵¹

Indian law scholars, advocates, and courts have all recognized this property interest in usufructuary hunting and fishing rights. Noted Indian law scholars Michael Blumm and Brett Swift, for instance, have characterized Northwest tribes’ fishing rights as a piscary profit, one of the oldest forms of profits à prendre.⁵² Another scholar has noted that recent case law shows “[N]ative treaty usufructs are by their nature property rights—profits à prendre—which are not inherently inconsistent with subsequent title transfers.”⁵³ One scholar points out that some courts have even likened the usufructuary right to the rights of a co-tenant in land.⁵⁴

Other scholars and courts have focused on the fact that a taking of usufructuary rights requires compensation, indicating that it is a cognizable

⁴⁹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (2000).

⁵⁰ *Id.* at cmt. d.

⁵¹ *Winans*, 198 U.S. 371, 381 (1905).

⁵² Blumm & Swift, *supra* note 38, at 445.

⁵³ Newhouse, *supra* note 38, at 190.

⁵⁴ Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 6 n.18 (2000) (citing Puget Sound Gillnetters Ass’n v. W. Dist. Ct. of Wash., 573 F.2d 1123, 1126-29 (9th Cir. 1978); United States v. Wash., 520 F.2d 676, 685 (9th Cir. 1975)).

property interest. *Menominee Tribe of Indians v. United States*,⁵⁵ an early seminal case on tribal treaty rights, held that curtailing or abrogating hunting and fishing rights granted under the Wolf River Treaty of 1854 would mean “destroying property rights” and would constitute a taking of the Tribe’s property, requiring just compensation.⁵⁶ Scholars have similarly explained that “a treaty fishing right is a property interest for which money damages may be sought.”⁵⁷

The property nature of hunting and fishing rights was most recently affirmed by the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*.⁵⁸ That case held that an Indian tribe’s hunting and fishing rights on off-reservation lands were durable and were not extinguished by a territory’s transition to statehood.⁵⁹ Even the dissent acknowledged the property nature of usufructuary rights, explaining that “the only real property interest in the land remaining to the Indians was the privilege to come onto it and hunt during the pleasure of the President.”⁶⁰ Though it does not use the term “*profit à prendre*,” the *Mille Lacs* Court nonetheless recognizes a concrete and durable property interest in treaty rights to hunt and fish, which survives transfer in fee simple of the burdened lands, subject only to limitations within the treaty language and a narrow exception for state regulation in the case of conservation necessity.⁶¹

Moreover, because the *Mille Lacs* case dealt with a treaty guaranteeing “hunting, fishing, and gathering rights,” and because the Court analyzed those rights together, it reaffirmed the equal nature of these different types of usufructuary rights.⁶² Even in treaties that nominally distinguish between the “right of taking fish” and the “privilege of hunting,”⁶³ the technical distinction does not factor into most courts’ analysis of these rights, and the reserved rights doctrine would indicate that the tribes reserved equal usufructuary *rights* to hunt and fish on the lands they had previously occupied.⁶⁴ In the proceedings of the treaty council leading to the signing of the Nez Perce Treaty, Governor Stevens

⁵⁵ *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

⁵⁶ *Id.* at 413.

⁵⁷ Sanders, *supra* note 17, at 154.

⁵⁸ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

⁵⁹ *Id.* at 204.

⁶⁰ *Id.* at 213 (Rehnquist, J., dissenting).

⁶¹ *Id.* at 204-05 (majority opinion).

⁶² *Id.* at 188-89.

⁶³ *E.g.*, Hellgate Treaty, *supra* note 7, art. 3; Nez Perce Treaty, *supra* note 7, art. 3; Umatilla Treaty, *supra* note 7, art. 1; Yakama Treaty, *supra* note 7, art. 3.

⁶⁴ See *United States v. Winans*, 198 U.S. 371 (1905); see also *supra* note 26 and accompanying text.

himself characterized the “privilege of hunting” guaranteed by the treaty as a “right” that the Tribe would retain.⁶⁵ Moreover, as at least one commentator has noted, it is extremely unlikely that the Indian tribes understood the legal distinction between a right and a privilege.⁶⁶ Because the canons of Indian treaty construction require treaties to be interpreted according to the way the tribes would have understood them at the time,⁶⁷ this factor, too, points toward interpreting the right to fish and the right to hunt as analogous rights.

At this point in the evolution of the doctrine, therefore, it is well established that treaty rights to hunt and fish off-reservation constitute a concrete property interest vested in the signatory tribe or tribes. But the exact contours of that property interest—in particular whether it contains an implied right of habitat and population protection—have proven much trickier to ascertain. Courts and commentators have developed a rich and nuanced picture of the scope of fishing rights without developing these theories as deeply in the hunting context, despite the fact that these rights are analogous. The following Parts attempt to bridge this gap.

II. THE EXERCISE OF TREATY FISHING RIGHTS

A. *Modern Treaty Fishing*

In the century since the landmark *Winans* case established the reserved rights doctrine, courts and commentators have struggled to define exactly what it means for a tribe to reserve a right to hunt and fish “in common with the citizens of the Territory,” as standard Stevens Treaty language guaranteed. As the case law has evolved, courts have generally accepted the idea that a fishing right includes an implied right of actual harvest,⁶⁸ but the extent of the implied requirement of habitat and population protection has not been fully settled.

The Yakama Treaty at issue in *Winans* was a Stevens Treaty and contains the standard language guaranteeing the “right of taking fish” and the “privilege of hunting” “in common with the citizens of the Territory,”⁶⁹ so it has

⁶⁵ Nye, *supra* note 19, at 187.

⁶⁶ *Id.* at 186.

⁶⁷ COHEN’S HANDBOOK, *supra* note 24, at 119-20, § 2.02[1].

⁶⁸ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 679, *modified sub nom.* *Washington v. United States*, 444 U.S. 816 (1979).

⁶⁹ Yakama Treaty, June 9, 1855, art. 3, 12 Stat. 951, 953.

formed a strong foundation for subsequent analysis of claims to fishing and hunting rights by Northwest tribes. Tribes started asserting and exercising these rights more actively in the 1950s and 1960s, with tribal citizens organizing “fish-ins” at off-reservation fishing sites,⁷⁰ eventually generating protests, counter-protests, and litigation.

The first major post-*Winans* cases on usufructuary treaty rights to reach the Supreme Court were a set of three cases involving the Puyallup Tribe of Washington State.⁷¹ This set of cases, which came before the Supreme Court three times between 1968 and 1977, dealt with the question of whether the State of Washington could regulate tribal members’ treaty fishing activities. The Court ultimately held that tribal fishing activities undertaken under treaty rights were mostly free from state regulation, with an exception permitting state regulation in the case of necessity “to conserve an important natural resource.”⁷² It also held that the right to take fish “in common with the citizens of the Territory” means that the Puyallup Tribe did not have an *exclusive* right to take fish, but, at the same time, “the State may not deny the Indians their right to fish ‘at all usual and accustomed’ places.”⁷³ The right to take fish, in short, must somehow be allocated between the Tribe and the State. In this case, the Court upheld the Washington State court’s allocation of 45 percent of the fishery to tribal treaty fishermen, but did not prescribe a general formula that would be applicable to other cases.⁷⁴ The Court could not dodge that question forever, though.

The question of how to divide fish harvests between tribal members and non-tribal members came squarely before the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.⁷⁵ In that case, the Court rejected the State of Washington’s argument that treaties reserving usufructuary rights guaranteed merely *access* to traditional fishing grounds.⁷⁶ Rather, the Court held:

⁷⁰ EagleWoman (Wambdi A. WasteWin), *supra* note 9, at 102.

⁷¹ Puyallup Tribe v. Dep’t of Game of Wash. (*Puyallup I*), 391 U.S. 392 (1968); Dep’t of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44 (1973); Puyallup Tribe, Inc. v. Dep’t of Game of State of Wash. (*Puyallup III*), 433 U.S. 165 (1977).

⁷² *Puyallup III*, 433 U.S. at 175; *see also* Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) (holding that tribes have authority to regulate off-reservation hunting and fishing activities of their members under tribal law).

⁷³ *Id.*

⁷⁴ *Id.* at 177.

⁷⁵ 443 U.S. 658, *modified sub nom.* Washington v. United States, 444 U.S. 816 (1979).

⁷⁶ *Id.* at 675.

It is equally plausible to conclude . . . that the specific provision for access was intended to secure a greater right—a right to harvest a share of the runs of anadromous fish that at the time the treaties were signed were so plentiful that no one could question the Indians’ capacity to take whatever quantity they needed. Indeed, a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and this Court’s prior construction of the treaties, mandates that conclusion.⁷⁷

As Justice Stevens went on to explain, under the reserved rights doctrine and the canons of Indian treaty construction it would make no sense for the Indians to believe they were reserving “merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.”⁷⁸

After deciding the treaty right guaranteed a share of the actual fish harvest, the Court then decided that an equitable measure of the right to take fish “in common with the citizens of the Territory” would divide the harvestable fishery into “approximately equal treaty and nontreaty shares,” with the possibility of reducing the treaty share “if tribal needs may be satisfied by a lesser amount.”⁷⁹ This important decision, therefore, not only affirmed that a treaty right to hunt or fish means there must actually be something to harvest, but also established the landmark fifty-fifty harvest allocation that would set the baseline for future decisions.

Most of the gains in treaty fishing rights have been made through litigation that has often been complicated and protracted. Though sometimes perpetuating animosity and antagonism, the legacy of this litigation has been the establishment and growth of relatively strong case law supporting off-reservation usufructuary rights. Despite the fact that most of the litigation has surrounded fishing activities specifically, this case law generally encompasses both hunting and fishing rights,⁸⁰ paving the way for strong and equal recognition of these rights. Moreover, once it was established in *Puyallup III* and *Fishing Vessel* that

⁷⁷ *Id.*

⁷⁸ *Id.* at 679.

⁷⁹ *Id.* at 685.

⁸⁰ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-89 (1999) (analyzing the Mille Lacs Band’s “hunting, fishing, and gathering rights” as a single set of rights).

treaty rights mean a right to actual harvest,⁸¹ this development strengthened the case for establishing an implied right of habitat and population protection.

B. Leveraging fishing rights for habitat and fish population protection

Analytically and logically, there is a strong argument for an implied right to habitat protection incorporated in the usufructuary treaty right. Tribes have been relatively successful at convincing courts to recognize this right in many situations, leveraging their treaty rights to block dams and other projects that would damage fish habitat.

1. Evolution of the habitat right

Tribes first asserted a right to habitat protection for fish populations in *United States v. Washington (Phase I)*,⁸² which initially found a right to habitat protection. In that case, the district court held that the intent behind Indian treaty fishing rights was clear: “there can be no doubt that one of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life.”⁸³ But the court also went further to recognize that the sustainability of those fisheries is implied in the right: “It is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless.”⁸⁴ On appeal, the Ninth Circuit affirmed this decision,⁸⁵ but on rehearing it found that the habitat question was not ripe,⁸⁶ effectively leaving the question to lower courts to decide on a case-by-case basis.

Since the decision in Phase I of *United States v. Washington*, the idea of an implied right to habitat protection has been taken up by many Indian law scholars, who likewise argue that a habitat protection component is necessary for the usufructuary right to have any meaning. The basic idea is that, in order to have fish available for treaty-guaranteed harvest, there must be habitat to sustain

⁸¹ *Puyallup Tribe, Inc. v. Dep’t of Game of State of Wash.*, 433 U.S. 165, 177 (1977); *Fishing Vessel*, 443 U.S. at 675.

⁸² *United States v. State of Wash.*, 506 F. Supp. 187 (W.D. Wash. 1980), *aff’d in part, rev’d in part*, 694 F.2d 1374 (9th Cir. 1982), *on reh’g*, 759 F.2d 1353 (9th Cir. 1985) (en banc).

⁸³ *Id.* at 205.

⁸⁴ *Id.*

⁸⁵ 694 F.2d 1374 (9th Cir. 1982).

⁸⁶ *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc).

those fish, as well as some sort of ongoing protection for the habitat and the fish population itself. If the courts' allocations of harvest or "yield" are to have any meaning, then the necessary conditions to sustain that yield must also exist—so the right to habitat protection flows from the Supreme Court's holding that tribes have a right to an actual harvest. Mary Christina Wood uses a "natural capital" model to explain this idea, characterizing the property right in treaty harvests as a "natural capital asset."⁸⁷ To sustain that asset, she argues, the right must be conceptualized as "including those components of the resource, such as habitat and robust populations, which combined bring about sustained harvestable yields over time."⁸⁸ "Wildlife capital," she says, "is generally comprised of two components: replenishing populations and supporting habitat," both of which are essential for the asset—the fishing right—to have meaning.⁸⁹

Along the same lines, other scholars have argued that the fishing profit à prendre created by treaty should be recognized as "a property right which includes two components: a right to access historic tribal fishing sites and a right to have sufficient fish to provide the tribes with a moderate living."⁹⁰ Another points out that "treaty fishing tribes have a legally protected expectancy that they will be able to continue to draw an advantage from the fish resource."⁹¹

As applied to treaty fishing rights, an implied right to habitat protection generally means the right to stop or alter dams and other proposed projects that would harm stream habitat for fish (mainly salmon, in the case of the Pacific Northwest tribes). By the time tribes started actively exercising and litigating their treaty rights—and courts started recognizing them—anadromous fish habitat had already been significantly degraded by the construction of numerous dams on the rivers where these fish migrate and spawn. From Columbia River salmon runs that had historically numbered ten to sixteen million salmon per year,⁹² fewer than three-quarters of a million fish made it past the Bonneville Dam and up the Columbia river in 1938, the year the dam was completed.⁹³

⁸⁷ Wood, *supra* note 54, at 5.

⁸⁸ *Id.* at 5-6.

⁸⁹ *Id.* at 6.

⁹⁰ Blumm & Swift, *supra* note 17, at 412.

⁹¹ Sanders, *supra* note 17, at 159.

⁹² *Columbia River Salmon*, COLUM. RIVER INTER-TRIBAL FISH COMMISSION, <http://www.critfc.org/salmon-culture/columbia-river-salmon> (last visited Nov. 17, 2014).

⁹³ *Adult Salmon Annual Totals*, FISH PASSAGE CENTER, http://www.fpc.org/adultsalmon/adultqueries/Adult_Annual_Totals_Query_form.html (last visited Nov. 17, 2014).

This number had risen to roughly one million to two million per year—still just a fraction of historical fish runs—in the 1950s, 1960s, and 1970s, when Northwest tribes were beginning to litigate their treaty fishing rights.⁹⁴ Having seen how quickly the salmon population could decline, tribes were understandably anxious to prevent numbers from plummeting back down to the levels of the 1930s and 1940s. Apart from using litigation simply to establish judicial recognition of their treaty fishing rights, therefore, tribes also began using litigation to protect those rights by opposing dams and other projects that would further harm salmon populations.

These lawsuits leveraging treaty fishing rights to protect salmon habitat and fish populations have achieved significant successes. While the Supreme Court has not explicitly ruled that a right to habitat protection exists within the broader treaty fishing right, lower courts have often impliedly recognized a right to habitat protection on a case-by-case basis. As Blumm and Swift note, the lower courts have “almost invariably provided the tribes with relief: requiring changed dam operations, halting dam construction and other damaging aquatic developments, and awarding the tribes ‘prior and paramount’ water rights to protect the fish that are the subject of the piscary profit.”⁹⁵

In several cases in the 1970s, for instance, the Confederated Tribes of the Umatilla Reservation (a Stevens Treaty tribe) successfully litigated dam operations that would threaten their treaty fishing rights. In the first case, *Confederated Tribes of the Umatilla Indian Reservation v. Callaway* (the “Peaking Power” case),⁹⁶ the district court judge approved a settlement that did not permit federal agencies to move forward with peaking power operations that would harm salmon runs until they had taken measures to protect alternate fishing sites.⁹⁷ Though the case did not enjoin the peaking power operations entirely, it was significant in recognizing that treaty fishing rights could be used to protect habitat for salmon.⁹⁸ Several years later, the Umatilla succeeded in using

⁹⁴ *Id.*

⁹⁵ Blumm & Swift, *supra* note 17, at 462.

⁹⁶ Civ. No. 72-211 (D. Or. Aug. 17, 1973).

⁹⁷ *Id.*; see also Blumm & Swift, *supra* note 17, at 463-64.

⁹⁸ Blumm & Swift, *supra* note 17, at 464.

their rights to halt construction of a dam altogether, in *Confederated Tribes of the Umatilla Indian Reservation v. Alexander* (the “Catherine Creek Dam” case).⁹⁹

Other cases have successfully leveraged treaty fishing rights to maintain in-stream water flows necessary for adequate salmon habitat. In *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*,¹⁰⁰ for instance, the Yakama Tribe litigated and successfully obtained a court order mandating the continued release of sufficient water to sustain salmon redds (spawning nests) and other measures that would ensure the viability of the redds.¹⁰¹ In *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*,¹⁰² similarly, the Ninth Circuit held that the Confederated Salish and Kootenai Tribes possessed “prior and paramount fishing water rights” with respect to the water rights held by the irrigation districts in the area.¹⁰³ The Bureau of Indian Affairs (BIA) therefore had authority to establish “stream flow and pool levels necessary to protect tribal fisheries,” and “[o]nly after fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the remaining waters among irrigators of equal priority.”¹⁰⁴

Still other cases have used tribal treaty fishing rights, and the right of access to fishing sites, to protect against streamside development. *No Oilport! v. Carter*,¹⁰⁵ for example, held that the Secretary of the Interior, in considering a permit for a proposed oil pipeline, was required to assess “whether the habitat of the Tribes’ treaty fishery has been adequately protected.”¹⁰⁶ Likewise, *Muckleshoot Indian Tribe v. Hall*¹⁰⁷ held that a preliminary injunction enjoining the construction of a marina was warranted where it potentially impaired access to

⁹⁹ *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977).

¹⁰⁰ *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985).

¹⁰¹ *Id.* at 1035. The other measures identified for preserving salmon redds included transplant, construction of berms, and the opening of certain channels. *Id.*

¹⁰² *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987).

¹⁰³ *Id.* at 1132.

¹⁰⁴ *Id.*

¹⁰⁵ *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981).

¹⁰⁶ *Carter*, 520 F. Supp. at 362.

¹⁰⁷ *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988).

the “usual and accustomed fishing places” where the Muckleshoot and Suquamish tribes were entitled to fish under the terms of their treaties.¹⁰⁸

2. Understanding the evolution of habitat rights

All these battles were fought through the courts, often in protracted litigation battles. Interestingly, most of the cases leveraging tribal treaty fishing rights have wielded those treaty rights as a negative right. A negative right, generally speaking, is the right to *prevent* another party from doing something that would interfere with the underlying right.¹⁰⁹ In the case of fishing rights litigation, wielding treaty fishing rights as a negative right has meant that tribes have primarily sued to *stop* projects from further degrading salmon habitat, rather than bringing affirmative litigation that would expand or improve salmon habitat from its current state. This approach fits with the Supreme Court’s conception of the usufructuary treaty rights: in a case interpreting Northwest tribes’ treaty rights, the Court explained that “a court possessed of the res in a proceeding in rem, such as one to apportion a fishery, may enjoin those who would interfere with that custody.”¹¹⁰ As one scholar concurred, “[t]he right to protect the fish . . . is a negative right, authorizing courts to enjoin those who would interfere with the fish that were the central bargain of the treaties.”¹¹¹

Suing to halt further habitat degradation makes sense given the current state of salmon habitat in the Northwest. Sharp declines in habitat occurred since historical days—much of it through relatively unsophisticated (and fish-unfriendly) dams built in the early and mid-twentieth century,¹¹² before treaty rights were asserted or recognized to the extent they are today—but there still exists enough contiguous habitat to support viable salmon runs. Any further degradation from this baseline level of habitat would threaten salmon runs further and would therefore be a more obvious violation of treaty rights, while it would be more difficult to sue affirmatively for proactive habitat restoration measures. Indeed, in one of the early affirmative cases in which tribes sought to compel the State of Washington to repair culverts that were impeding salmon migration, the district court ruled in favor of the tribes but specifically said that the ruling did not create

¹⁰⁸ *Hall*, 698 F. Supp at 1511.

¹⁰⁹ BLACK’S LAW DICTIONARY (2009).

¹¹⁰ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 693 n.32, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979).

¹¹¹ Blumm & Swift, *supra* note 17, at 412.

¹¹² Dams of the Columbia Basin & Their Effects on the Native Fishery, CENTER FOR COLUMBIA RIVER HISTORY, <http://www.ccrh.org/comm/river/dintro.php> (last visited Nov. 17, 2014).

“a broad ‘environmental servitude’ or the imposition of an affirmative duty to take all possible steps to protect fish runs as the State protests, but rather a narrow directive to refrain from impeding fish runs in one specific manner.”¹¹³ This judge’s explanation almost perfectly reflects the view of usufructuary rights as a negative right.

As always, there are some exceptions to the rule, and there have been some successful attempts to restore salmon habitat. As one recent example, the Environmental Protection Agency referred to treaty fishing rights and consulted the Confederated Salish and Kootenai Tribes in the removal of the Milltown Dam in Montana.¹¹⁴ But in many of these cases, treaty rights are not the only or even the primary impetus for the change. Cleanup of the superfund site at the Milltown dam, for instance, was a primary driver of that dam removal project. In Washington and Oregon, the Northwest Power Act and the Endangered Species Act have been primary drivers of affirmative habitat restoration, albeit with limited success.¹¹⁵ In contrast to these examples of proactive restoration, the weight of litigation has been tribes using their treaty rights to stop new dam construction projects that would further harm salmon habitat, rather than to mandate affirmative actions that would improve current habitat.

This does not mean the treaty right inherently fails to encompass an affirmative right to habitat restoration and higher harvestable population numbers. Indeed, ongoing litigation in Washington is continuing to test the waters in this respect, as a number of tribes continue to seek a determination that the State of Washington has a duty to protect fish runs and to repair or replace old culverts that hamper salmon migration.¹¹⁶ Such an affirmative right to habitat protection is ultimately necessary in order to ensure full recognition of tribes’ treaty-guaranteed rights. But the traditional conception—and the application, thus far—of the treaty fishing right mainly as a right to halt further habitat destruction shows that it may be easier under the current framework to enjoin further harm than to proactively restore habitat.

¹¹³ *United States v. Washington*, CV 9213RSM, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).

¹¹⁴ Milltown Reservoir Sediments Operable Unit of the Milltown Reservoir/Clark Fork River Superfund Site, *Record of Decision, Part I: Declaration*, ENVTL. PROTECTION AGENCY (2004), <http://www2.epa.gov/sites/production/files/documents/mrsRODpt1.pdf>.

¹¹⁵ JUDITH ROYSTER ET AL., *NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS* 516 (2013).

¹¹⁶ *E.g.*, *United States v. Washington*, CV 70-9213, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013).

Though it has mainly been used in this limited way, litigation over fishing rights has nonetheless had the benefit of giving tribes their day in court, in turn achieving judicial recognition of treaty fishing rights, including some recognition of the implied right to habitat protection. This is a key difference between treaty fishing rights and treaty *hunting* rights, which have not been litigated to the same extent, and thus have not yet been leveraged to achieve habitat protection.

III. THE EXERCISE OF TREATY HUNTING RIGHTS

A. *Unleveraged Rights: Modern Treaty Hunting*

Although the treaty-guaranteed right to hunt off-reservation under Stevens Treaties is of the same nature as the right to fish off-reservation, treaty hunting rights have evolved differently. Treaty hunting rights have been surrounded by significantly less litigation than fishing rights, and they have not, for the most part, been wielded as a tool to address habitat protection either on a large scale or on a case-by-case basis.

The case law around treaty hunting rights is sparser, at least on the federal level, but there is nonetheless a solid line of cases recognizing that treaty hunting rights must be upheld under the Supremacy Clause and the canons of Indian treaty construction. One case on hunting rights that did make it to the Supreme Court, *Antoine v. Washington*,¹¹⁷ held that off-reservation hunting rights guaranteed to the Colville Confederated Tribes could not be abrogated through state legislation, nor could off-reservation hunting activities of tribal members be regulated by the State of Washington.¹¹⁸ Moreover, the Court held that the Supremacy Clause and the canon of construction mandating interpretation favorable to the Indians applied despite the fact that the agreement in question was made after the United States had ended its official treaty-making with Indian tribes.¹¹⁹ Hunting rights guaranteed through actual treaty would therefore presumably be even more secure and durable.

In addition, many of the major federal cases decided in the context of fishing rights also apply to hunting rights because the Court analyzed hunting

¹¹⁷ *Antoine v. Washington*, 420 U.S. 194 (1975).

¹¹⁸ *Id.* at 205.

¹¹⁹ *Id.* at 204.

and fishing as one set of rights. From *Fishing Vessel*¹²⁰ and the *Puyallup Cases*¹²¹ to *Mille Lacs* most recently,¹²² the Supreme Court has repeatedly reaffirmed that hunting and fishing rights (and the much less often contested gathering rights), together, make up the usufructuary rights guaranteed by treaty. This is true notwithstanding Stevens Treaty language describing “the right of taking fish” and “the privilege of hunting.”¹²³ Indeed, when the *Antoine* Court cited a portion of *Puyallup I* that specifically discussed fishing rights, the *Antoine* Court interpreted that passage to impliedly include hunting rights, such that the *Antoine* opinion added the parenthetical phrase “and hunting” twice in its reproduction of the quotation.¹²⁴ That is not the work of a Court that draws legal distinctions between hunting and fishing rights.

Finally, a number of state court decisions in the Northwest have established and upheld strong judicial recognition of treaty hunting rights. In Montana, for instance, *State v. McClure*¹²⁵ in 1954 established that the Treaty of Hellgate (a Stevens Treaty, as noted above) with the Confederated Salish and Kootenai Tribes (CSKT) was the supreme law of the land under the Supremacy Clause, and that CSKT tribal law was proper for regulating hunting by tribal members. In 1977, *State v. Stasso*¹²⁶ went further and established that CSKT members were free from state laws when conducting treaty hunts on “open and unclaimed” lands in Montana. In Idaho, *State v. Arthur*¹²⁷ used the canons of Indian treaty construction to establish that the right to hunt on “open and unclaimed” lands encompassed lands that are currently federally owned, including National Forest lands. State court decisions in Washington and Oregon

¹²⁰ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684, *modified sub nom.* *Washington v. United States*, 444 U.S. 816 (1979).

¹²¹ *E.g.*, *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 400 (1968).

¹²² *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-89 (1999).

¹²³ *See supra* notes 63-66 and accompanying text.

¹²⁴ *Antoine*, 420 U.S. at 207. With the “hunting” insertions, the *Antoine* Court's citation of *Puyallup I* reads as follows:

In *Puyallup I*, . . . we held that although, these rights ‘may . . . not be qualified by the State, . . . the manner of fishing (and hunting), the size of the take, the restriction of commercial fishing (and hunting), and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.’

¹²⁵ *State v. McClure*, 268 P.2d 629 (Mont. 1954).

¹²⁶ *State v. Stasso*, 563 P.2d 562 (Mont. 1977).

¹²⁷ *State v. Arthur*, 261 P.2d 135 (Idaho 1953).

tended to focus on fishing rights but also recognized treaty hunting rights as equal and valid.¹²⁸

Treaty rights to hunt on open and unclaimed lands, thus, are well established at both the state and federal levels. Yet none of these cases have focused on the legal scope of treaty hunting rights in the way that cases on treaty fishing rights have aimed to establish that the scope of fishing rights includes a right to habitat protection. As explored further below, the conception of usufructuary treaty rights as a negative right, when viewed alongside the differing rates of habitat destruction for fish and game species, may be a key reason why treaty fishing rights have evolved differently from treaty hunting rights.

A second important difference between fishing and hunting is that fish inhabit streams and rivers, which are inherently geographically limited, whereas game animals roam across terrestrial habitat that is potentially much more vast. Moreover, no one can claim exclusive property rights in the waterways that fish inhabit, whereas lands are subject to more complete divisions of property rights. This difference, however, may be somewhat less important than it first seems. For one thing, settled case law around the treaty right to hunt on “open and unclaimed” lands has established that treaty hunting rights do not apply on private land, because it is not “unclaimed.”¹²⁹ The majority of off-reservation treaty hunting takes place on National Forest lands, which are generally considered “open and unclaimed” for treaty hunting purposes.¹³⁰ Thus, just as fishing rights are exercised in publicly accessible (and inherently not privately owned) waters, treaty hunting rights, too, are exercised only on publicly accessible lands. Furthermore, while fishing rights are actually exercised within relatively limited waterways, the implied right of habitat protection implicates entire rivers and sometimes even entire watersheds. So although there is an

¹²⁸ *E.g.*, *State v. Jim*, 725 P.2d 365, 369 (Or. App. 1986) (“Many Indian tribes have reserved hunting and fishing rights which are protected in treaties”); *State v. Miller*, 689 P.2d 81, 85 (Wash. 1984) (“For treaty purposes, there is no operative distinction between the terms “right” [to fish] and “privilege” [of hunting].”).

¹²⁹ *See, e.g.*, *State v. Watters*, 156 P.3d 145, 154-55 (Or. App. 2007) (holding that the land on which Nez Perce members took elk was not “open and unclaimed” within meaning of the Nez Perce treaty, and therefore tribal members did not have a right to hunt there); *United States v. Hicks*, 587 F.Supp. 1162 (D.Wash.1984) (order reinstating action) (a national park was not “open and unclaimed” within the meaning of the treaty).

¹³⁰ *See, e.g.*, *State v. Miller*, 689 P.2d 81, 82 (Wash. 1984) (“The parties stipulated that petitioners killed the elk on national forest land. Several courts have determined that such land is “open and unclaimed” within the meaning of the treaty.”); *see also infra* notes 126-127 and accompanying text.

important geographically based distinction between treaty rights to fish in rivers and to hunt on land, the scope of these differences may be smaller than it appears.

A third relevant factor is that the battle over fishing rights is a very high-stakes game, with millions of dollars' worth of salmon harvest on the line every year. It makes sense that the contentious atmosphere around this limited but valuable resource tends to produce litigation. By contrast, it is illegal to sell wild-caught game meat in most states, so big-game hunting has not been commercialized in the way that the fishing industry has. This means there is generally less opposition to tribes' exercise of their treaty rights to hunt deer and elk. While sport hunters could see Native hunters as competing with them for a scarce resource, the relative abundance of most game animals minimizes this potential conflict. Even in the case of scarcer species like bison, a competitive dynamic plays only a limited role. The lack of industry-backed opposition to Native hunters could therefore be another major reason for the lack of litigation surrounding hunting rights, in stark contrast to the industry opposition to Native fishermen.

The reasons for the underdevelopment of hunting rights, therefore, largely relate to these circumstantial differences between hunting and fishing—not to any difference in the legal substance of the right. Now, as tribes are increasingly asserting their treaty hunting rights, the legal doctrine surrounding fishing rights will likely guide courts' and scholars' interpretation of hunting rights. Treaty hunting of wild bison in the Greater Yellowstone Area provides a useful illustration of how the implied right of habitat protection from the fishing context could be applied to give tribes an affirmative right in the hunting context. In a context where wild bison sorely need more habitat in order to thrive, tribes may have an opportunity to work toward this goal by asserting an affirmative right to habitat protection encompassed within their treaty hunting right.

B. No Room to Roam: Bison and Treaty Rights in Greater Yellowstone

In the area surrounding Yellowstone National Park, known as the Greater Yellowstone Area (GYA), Native tribes, ranchers, conservationists, homeowners, and state and federal agencies often clash and sometimes collaborate on management of the country's only continuously wild bison population. Tribes' exercise of their treaty rights to hunt bison outside the park, without significant

gains in habitat for the area's bison population, illustrates that it may be easier to use treaty rights to halt further habitat degradation—as in the fishing rights cases—than to make affirmative habitat gains. But as explored further below, a negative right is essentially useless if a species' habitat has already been largely destroyed, as in the case of wild bison. Therefore, treaty rights should not be interpreted to exclude the possibility of an affirmative right to habitat protection and expansion. Indeed, the bison paradox highlights the fact that tribal usufructuary rights can only be fully vindicated if they are interpreted to encompass an affirmative right to habitat protection and restoration, allowing huntable wildlife populations to rebound and ultimately thrive.

1. Background on Yellowstone bison

Wild bison, also known as American buffalo, once numbered approximately forty million and ranged from Mexico to Canada and from California to New York.¹³¹ For many of the Native tribes that hunted bison, the animal was not only important as a source of food and materials for tools, clothes, and shelter, but was also culturally and spiritually important. As one Oglala Sioux holy man explained:

“[t]he buffalo represents the people and the universe and should always be treated with respect. For was he not here before the two-legged peoples, and is he not generous in that he gives us our homes and our food? The buffalo is wise in many things, and thus we should always be as a relative with him.”¹³²

Massive slaughter of these once-magnificent buffalo herds took place in the late 1800s, spurred by the westward expansion of railroads, the price of buffalo hides (or “buffalo robes”), and United States government policy aiming to subjugate Native tribes by destroying their source of sustenance.¹³³ It is estimated that more than thirty-one million bison were killed between 1868 and

¹³¹ Keith Aune, Kent Redford & Kelly Aylward, *Ecological Restoration of Bison*, AM. BISON SOC'Y, WILDLIFE CONSERVATION SOC'Y 2 (date unavailable), http://www.americanbisonsocietyonline.org/Portals/7/ABS_EcologicalRestorationofBison_factsheet.pdf.

¹³² *Buffalo Are Sacred*, INTER-TRIBAL BUFFALO COUNCIL, <http://itbcbuffalo.com/node/19> (last updated 2011) (quoting Oglala Sioux holy man Black Elk).

¹³³ *Slaughter of the Buffalo*, INTER-TRIBAL BUFFALO COUNCIL, <http://itbcbuffalo.com/node/22> (last updated 2011).

1881, with only five hundred bison left by 1885.¹³⁴ At its nadir, the entire United States bison population was reduced to fewer than fifty animals remaining in the wild, in a remote region of the newly established Yellowstone National Park.¹³⁵ Today's wild bison herds in Yellowstone are descended from those few dozen animals.

Through a century of conservation efforts, begun just as bison teetered on the brink of extinction, the Yellowstone bison population has now increased to between 3,000 and 4,500 animals.¹³⁶ Other conservation herds (wild bison herds or confined herds primarily managed for conservation of the species, rather than for meat) have also been established elsewhere in the country. But the gains are meager compared to historical times; best estimates indicate that bison still occupy less than one percent of their historical (circa 1500) range.¹³⁷ Plains bison are therefore considered ecologically extinct throughout their original range.¹³⁸

As the bison population within Yellowstone National Park gradually expanded, in the 1980s the herds began migrating out of the park and into the State of Montana in the winter months, in search of better winter habitat.¹³⁹ These annual migrations spawned concerns that the bison would transmit the non-fatal disease brucellosis to cattle in Montana, leading to intense conflicts between local ranchers and bison conservation advocates. Livestock producers wanted bison confined to Yellowstone National Park, while bison advocates wanted the herds to have access to winter habitat outside the park. Similar battles played out between state livestock and wildlife agencies and federal land management and disease control agencies, as they struggled to decide how to manage the roaming bison population. Protracted litigation finally culminated in a

¹³⁴ *Id.*

¹³⁵ *Bison Basics: Biology, Behavior, and a Brief History*, CITIZENS WORKING GROUP ON BISON EDUCATION (2013), <http://ibmp.info/Library/BisonEducation/BisonBrochure1.pdf>.

¹³⁶ Chris Geremia et al., *Managing the Abundance of Yellowstone Bison, Winter 2014*, INTERAGENCY BISON MGMT. PLAN 1 (2013), http://ibmp.info/Library/20130731/BisonHarvestPlan_Winter2014_Final.pdf (citing population estimates and describing population fluctuations at different times of year).

¹³⁷ Aune, Redford & Aylward, *supra* note 131, at 2.

¹³⁸ Curtis H. Freese, et al., *Second Chance for the Plains Bison*, 136 BIOLOGICAL CONSERVATION 175, 178 (2007), available at <http://www.gprc.org/Freese.pdf>.

¹³⁹ Mary Meagher, *Range Expansion by Bison of Yellowstone National Park*, 70 J. MAMMOLOGY 670, 673 (1989).

consent decree and Record of Decision signed by five state and federal agencies in 2000, creating the Interagency Bison Management Plan (IBMP).¹⁴⁰

The IBMP Partners include the National Park Service, the United States Forest Service, the Animal and Plant Health Inspection Service (a federal agency within the United States Department of Agriculture), the Montana Department of Livestock, and the Montana Department of Fish, Wildlife, and Parks. Each of these agencies is bound by the terms of the Record of Decision, but each also has its own distinct statutory mandate. The twin goals of the IBMP are to maintain a viable, free-ranging bison herd while also preventing brucellosis transmission from bison to cattle.¹⁴¹ Together the agencies tightly manage the Yellowstone bison herd and its access to potential habitat outside the park.

In practice, for the most part, this has meant that Yellowstone bison have extremely limited access to habitat outside the park. The current implementation protocols for the IBMP require bison to be removed from their winter habitat in Montana each year in mid-spring, before they would naturally migrate back into the park.¹⁴² This removal is accomplished by hazing the bison herds with helicopters, ATVs, riders on horseback, and sometimes snowmobiles.¹⁴³ The result is that bison have no year-round habitat, or even habitat that they can use on a cycle consistent with their natural migration patterns, outside Yellowstone National Park. And in years when the numbers of bison that leave the park are too great to manage, state and federal agencies routinely capture bison and often ship them to slaughter facilities, sending the meat to Native tribes and food banks. Not only does this management scheme deprive the Yellowstone bison herd of access to habitat; keeping the herd geographically and numerically confined also limits tribes' access to culturally important and treaty-guaranteed

¹⁴⁰ See MONT. DEP'T OF LIVESTOCK & MONT. DEP'T OF FISH, WILDLIFE & PARKS, INTERAGENCY BISON MANAGEMENT PLAN FOR THE STATE OF MONTANA AND YELLOWSTONE NATIONAL PARK (2000) [STATE ROD]; U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF AGRICULTURE, RECORD OF DECISION FOR FINAL ENVIRONMENTAL IMPACT STATEMENT AND BISON MANAGEMENT PLAN FOR THE STATE OF MONTANA AND YELLOWSTONE NATIONAL PARK (2000) [FEDERAL ROD].

¹⁴¹ FEDERAL ROD, *supra* note 140, at 6.

¹⁴² *Operating Procedures for the Interagency Bison Management Plan*, INTERAGENCY BISON MANAGEMENT PLAN 6-7 (2013), http://ibmp.info/Library/OpsPlans/2014_IBMP_%20WinterOperationsPlan_final.pdf.

¹⁴³ Stephany Seay, *Update from the Field: Buffalo Nightmare, Helicopter Returns*, UPDATES FROM THE FIELD (Buffalo Field Campaign), May 16, 2013, *available at* <http://www.buffalofieldcampaign.org/media/update1213/051613.html>.

hunting opportunities. It also costs taxpayers \$2 million annually in bison capture, hazing, and other management costs.¹⁴⁴

2. *Treaty hunting of bison*

Despite the lack of consistent habitat, often enough bison leave the park during the fall and winter that a fair-chase hunt can be held.¹⁴⁵ Within the past decade, four tribes have asserted and begun to exercise their treaty rights to hunt these bison.¹⁴⁶ Three of those tribes—the Confederated Salish and Kootenai Tribes (CSKT), the Nez Perce Tribe, and the Confederated Tribes of the Umatilla Indian Reservation—are Stevens Treaty tribes, while the fourth—the Shoshone-Bannock Tribe—is not. All of these tribes, among others, traditionally hunted bison in the region that is now the Greater Yellowstone Area. Compared to the process surrounding fishing rights, the process of tribes asserting their treaty hunting rights and the state recognizing those rights has been relatively less contentious.

The Nez Perce Tribe was the first to assert its treaty right to hunt bison in Greater Yellowstone, beginning in the 2005-2006 fall and winter hunting season. Rebecca Miles, Chairman of the Nez Perce Executive Committee (the Tribe's governing body) at that time, explains that the tribe had long hoped to have an opportunity to begin exercising their bison hunting rights again. "Ever since we were denied the right to hunt buffalo," Miles says, "we've been wanting to go back and hunt buffalo."¹⁴⁷ From its involvement in salmon fishing, the tribe had longstanding experience asserting and exercising treaty rights to fish in off-reservation waters, which it could bring to the hunting context. So in 2005, the Tribal Executive Committee and the tribe's Fish and Wildlife Commission prepared to reestablish a tribally run buffalo hunt.

The Nez Perce Tribal Executive Committee sent the Governor of Montana a copy of the Nez Perce Treaty of 1855 and other historical documentation both

¹⁴⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-291, YELLOWSTONE BISON: INTERAGENCY PLAN AND AGENCIES' MANAGEMENT NEED IMPROVEMENT TO BETTER ADDRESS BISON-CATTLE BRUCELLOSIS CONTROVERSY (2008), <http://www.gao.gov/assets/280/273472.pdf>

¹⁴⁵ See *Montana Bison Frequently Asked Questions*, MONT. FISH, WILDLIFE & PARKS, <http://fwp.mt.gov/hunting/planahunt/huntingGuides/bison/bisonFaq.html#question6> (last visited Nov. 9, 2014).

¹⁴⁶ *Tribal Treaty Rights*, MONT. FISH, WILDLIFE & PARKS (undated), available at <http://fwp.mt.gov/fwpDoc.html?id=55671> (last accessed Nov. 9, 2014).

¹⁴⁷ Telephone Interview with Rebecca Miles, former Chairman of the Tribal Executive Committee, Nez Perce Tribe (Nov. 22, 2013).

establishing their treaty hunting right and showing that the GYA fell within their aboriginal hunting territory. Brian Schweitzer, the Governor at the time, was generally supportive of tribal rights. So with relatively little conflict, the Nez Perce Executive Committee member says, “the Governor welcomed us back to our historical hunting grounds.”¹⁴⁸ The official letter from Governor Schweitzer recognizing the Tribe’s treaty right to hunt bison shows a strong, nuanced, and favorable understanding of tribal treaty rights:

The State of Montana respectfully acknowledges that the Tribe will be exercising its treaty-reserved rights on open and unclaimed land in Montana by harvesting up to five (5) buffalo/bison on the Gallatin National Forest for ceremonial and subsistence purposes. Montana is relying on the information you provided that documents the historic hunting of buffalo/bison in Montana.¹⁴⁹

That first year the tribe conducted a small-scale youth hunt—to send a message to young tribal members: “this is your right”¹⁵⁰—followed by larger hunts open to all tribal members in subsequent years.

The process of asserting their rights and receiving state recognition, Miles says, did not require the same effort it had taken to establish fishing rights. Both the Nez Perce and the State of Montana wanted to avoid courtroom battles, so they were able to agree on an initial recognition of rights that has evolved in the years since. Miles believes, however, that this process would not have happened thirty or forty years earlier, when tribes were still just beginning to assert their treaty rights actively.¹⁵¹ The strong case law that had been developed surrounding treaty fishing rights had laid the groundwork for a relatively smoother process of asserting treaty hunting rights.

Other tribes’ subsequent processes of asserting and exercising their treaty rights to hunt Yellowstone bison unfolded similarly. The CSKT, which also had past experience with off-reservation treaty rights, including some off-reservation hunting of other big-game species, initially sought to exercise their right to hunt bison in response to a new Montana statute authorizing a public bison hunt

¹⁴⁸ *Id.*

¹⁴⁹ Letter from Brian Schweitzer, Governor of Mont., to Rebecca Miles, Chairman, Nez Perce Tribal Executive Committee (Jan. 27, 2006) (on file with author).

¹⁵⁰ Telephone interview with Rebecca Miles, *supra* note 147.

¹⁵¹ *Id.*

outside Yellowstone. As the Tribes' attorney John Harrison explains, once the state authorized a bison hunt, the CSKT responded by saying, in essence, "we'll go ahead and add that to the list of species that we can hunt 'in common with' the people of the State" (who have by now, of course, replaced the "citizens of the Territory" originally referred to in the Treaty of Hellgate).¹⁵² The CSKT leadership then provided the state with documentation that demonstrated their treaty rights to hunt bison in the GYA, including the Hellgate Treaty and another treaty that established a common hunting grounds for a number of tribes, which the CSKT used to show that the GYA fell within their traditional hunting territory.¹⁵³ As with the Nez Perce, the State of Montana accepted the CSKT's documentation and officially recognized the CSKT's treaty rights to hunt bison in a similar letter dated July, 2006.¹⁵⁴

This time, the State of Montana also went on to say to the CSKT: "You suggest in your letter that FWP [Montana Fish, Wildlife & Parks] might wish to discuss a state-tribal cooperative agreement to allow tribal members to hunt on all lands within the district, and FWP would be willing to entertain further discussion with the [T]ribe along those lines."¹⁵⁵ Indeed, starting in the summer of 2007, the three sovereigns managing the hunt at that point—the State of Montana, the Nez Perce, and the CSKT—met together to discuss how to co-manage the annual bison hunt. A good idea at the outset, this consultation would soon become even more necessary.

Despite the relatively smooth process, as in the fishing cases, conflict inevitably arose over who could harvest how much. An official who helps manage the bison hunt for Montana Fish, Wildlife and Parks (FWP) describes the problem simply as "the sharing of a limited resource."¹⁵⁶ Under the line of fishing rights cases guaranteeing tribes fifty percent of the fish harvest, the State believed that the Nez Perce and the CSKT were collectively entitled to fifty percent of the bison harvest, and believed a court would be likely to uphold that division of the

¹⁵² Telephone interview with John Harrison, Tribal Attorney, Confederated Salish and Kootenai Tribes (Nov. 19, 2013).

¹⁵³ Treaty with the Blackfoot and Other Tribes of Indians, Oct. 17, 1855, 11 Stat. 657.

¹⁵⁴ Letter from Jeff Hagener, Dir., Mont. Fish, Wildlife & Parks to James Steele, Jr., Chairman, Confederated Salish and Kootenai Tribes of the Flathead Nation (July 21, 2006) (on file with author).

¹⁵⁵ *Id.*

¹⁵⁶ Telephone Interview with two state officials (anonymous), Mont. Fish, Wildlife & Parks (Nov. 15, 2013).

harvest, with some possible variation.¹⁵⁷ While the tribes never agreed to limit their harvest to this fifty-fifty split, the larger sticking point was that, as long as the state was capturing bison and shipping them to slaughter, the tribes believed the slaughtered bison should count toward the state's share of the total harvest.¹⁵⁸ The State, meanwhile, believed its hands were tied by the IBMP regarding ship-and-slaughter as a necessary tool, and FWP wanted to preserve fifty percent of the actual hunt for state-licensed hunters.

Interestingly, rather than leading to litigation, this conflict led to further consultations between the state and tribal governments. These consultations ultimately led to the inclusion of the Nez Perce, the CSKT, and also the InterTribal Buffalo Council as Partners in the IBMP. This meant that the tribes gained a say in managing bison and habitat in Greater Yellowstone. For the tribes, this step seemed fitting and perhaps overdue. "We consider ourselves co-managers," John Harrison said of the CSKT.¹⁵⁹ The Nez Perce, for their part, brought significant co-management experience from the fisheries context, as a party to the Columbia River Fisheries Management Plan.

However, the state and federal partners are still bound by explicit statutory mandates, as well as the initial consent decree and Record of Decision; as a result, their voices tend to be heard more strongly than the tribal voices at IBMP meetings. The two other Native nations that have succeeded in getting their treaty hunting rights recognized in the past several years, the Confederated Tribes of the Umatilla Indian Reservation and the Shoshone-Bannock Tribes, have not been made IBMP Partners. Thus these tribes have even less of a voice in the process. The result has been minimal progress on bison habitat. Why is this so?

3. *The Paradox of a Negative Right*

Paradoxically, the almost complete lack of bison habitat may be part of the reason why it is so hard to leverage treaty hunting rights to protect that same habitat. As shown earlier, usufructuary treaty rights have thus far been applied primarily as a negative right.¹⁶⁰ The bison case study further illustrates the fact

¹⁵⁷ Telephone interview with John Harrison, *supra* note 152.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* notes 110-115 and accompanying text.

that it is easier to bring a suit to stop a harmful project than to sue for affirmative gains.

As CSKT attorney John Harrison explained, if the state and federal IBMP partners said they were going to fence the border of Yellowstone National Park and not allow any bison to migrate onto their winter habitat in Montana, the tribes would probably have few qualms about suing them. “The Tribes would seriously consider filing a suit and I expect we would end up in federal court,” Harrison says.¹⁶¹ The tribes, this means, would sue to stop further habitat *diminishment*—wielding their treaty right in the form of a negative right—but they are willing to try to use consultative processes to make *affirmative* progress on habitat. The CSKT and Nez Perce know they are holding an “implicit threat of litigation” if the state and federal agencies implement policies that leave no bison for hunting, but short of that, they want to stay out of court.¹⁶² And indeed there has been no litigation regarding tribal treaty hunting of Yellowstone bison, at any stage of the process.

Risk aversion also plays a role in the decision not to wield treaty rights as an affirmative right in court. If the tribes sue for affirmative gains, there exists the possibility that they could end up worse off than when they began. As former Nez Perce Chairman Rebecca Miles explains:

Any smart sovereign will strategize on litigation. Courtrooms are the modern-day battlefield. In any courtroom battle, there are risks. As a former leader of a sovereign nation that has worked to protect and enhance our citizens’ tribal treaty rights, and with Montana looking at their future, we have both been good stewards and smart sovereigns to agree on this particular issue.¹⁶³

The consultative method has undoubtedly resulted in more goodwill between the tribes and the State, potentially laying the groundwork for progress. Due in part to pressure from the treaty hunting tribes as well as bison conservationists, the State of Montana is currently considering a plan that would allow bison to remain on their seasonal habitat for longer in the spring.¹⁶⁴ But

¹⁶¹ Telephone interview with John Harrison, *supra* note 152.

¹⁶² *Id.*

¹⁶³ Telephone interview with Rebecca Miles, *supra* note 147.

¹⁶⁴ *Draft Joint Environmental Assessment: Year-round Habitat for Yellowstone Bison*, MONT. DEPARTMENT OF LIVESTOCK & MONT. FISH, WILDLIFE & PARKS (July 2013), fwp.mt.gov/fwpDoc.html?id=60011.

while waiting for this slow progress, the consultative process has also meant that the tribes have not had their day in court to assert a right to habitat protection as part of their treaty right.

Unlike rivers—which, as noted above, cannot be claimed—extensive portions of once-wild *lands* had already been divided up by private property owners prior to the modern assertion of treaty hunting rights. Under a negative rights framework, this puts bison habitat, and bison hunters, in a tough spot. Essentially, bison habitat and population numbers are in such bad shape compared to their historical numbers that there are few active threats that would actually worsen the situation (in contrast to new proposed dams, or other projects that would harm salmon habitat). So there are now fewer opportunities to wield treaty rights as a negative right. And because tribes are reluctant to wield their treaty right as an affirmative right in the courts, this means that there has been less litigation. This is the paradox of a negative right to harvest fish or bison: the worse the starting point, the less helpful the right. The baseline level of habitat effectively defines what is considered a threat to that baseline. Because bison habitat and bison numbers were decimated so dramatically before tribes began exercising their modern treaty rights to hunt bison, the right to enjoin further harm cannot bring much progress.

But as seen in the fishing cases, most courts, when pressed, will recognize an implied right of habitat protection. Scholars likewise agree that treaty hunting rights encompass this implied right.¹⁶⁵ Furthermore, as previously noted, the implied right of habitat protection is not necessarily always a negative right,¹⁶⁶ and tribes are beginning to test courts' willingness to recognize an affirmative right to habitat protection.¹⁶⁷ These efforts toward court recognition of affirmative habitat rights for salmon came as a result of tribal leaders' "increasing impatience with the lack of restoration progress."¹⁶⁸ Therefore, if the current lack of bison habitat persists, it may be only a matter of time before the bison-hunting tribes start more actively demanding expanded bison habitat and better bison protection. If this is the case, the state and federal agencies have a strong interest in making the consultative process meaningful, and allowing it to achieve actual progress. Yellowstone National Park and the State of Montana recently

¹⁶⁵ Wood, *supra* note 54, at 6.

¹⁶⁶ See *supra* note 116 and accompanying text.

¹⁶⁷ See, e.g., *United States v. Washington*, CV 70-9213, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013).

¹⁶⁸ Blumm & Swift, *supra* note 17, at 411.

announced that they will soon begin working to develop a new bison management plan,¹⁶⁹ which would be an excellent opportunity to incorporate stronger habitat protections into an official management plan. Because if the IBMP or its successor fails to make meaningful progress on habitat, at some point tribes will take their rights to court and will insist on habitat expansion that way. And all the interested parties would like to avoid that outcome.

IV. CONCLUSION

Treaty hunting of bison in Greater Yellowstone illustrates the fact that it is easier to wield a negative right in court, but it also poignantly highlights the problem with negative rights: the worse the situation, the less helpful the right. The bison paradox thus demonstrates the need for a more expansive and affirmative conception of usufructuary treaty rights. As this article has shown, treaty hunting rights are no different from treaty fishing rights. Treaty hunting rights should thus be interpreted to include the implied right of habitat protection that has developed in the fishing-rights context. Moreover, the implied right of habitat protection must be interpreted to include an affirmative right to improve and expand habitat where it has already been eliminated, not just a right to enjoin further habitat destruction. Such a conception is consistent with the jurisprudence and legal commentary on usufructuary rights, and it is also necessary for guaranteeing that tribes have a way to escape the paradox of a negative right to habitat protection—to fully vindicate the rights guaranteed to them more than a century ago and maintain adequate access to culturally and nutritionally important fish and game harvests.

The lack of litigation over hunting rights may have preserved goodwill in that context, but it also means that tribes have less of a chance to wield their right and develop case law recognizing their treaty rights and an implied right of habitat protection. Yet it is clear that the substance of hunting rights is no different from the substance of fishing rights, so, if litigated, courts would be required to find a right to habitat protection in the hunting context as well. Going forward, creating a consultative process that would actually reduce the need for habitat-protection litigation would require active, meaningful collaboration and a willingness on both sides to make progress. Scholars have proposed various

¹⁶⁹ Interagency News Release, Yellowstone National Park, Montana Department of Livestock & Montana Fish, Wildlife & Parks, State of Montana and National Park Service to jointly develop new Bison Management Plan (Mar. 28, 2014), <http://www.nps.gov/yell/parknews/032814.htm>.

collaborative processes by which tribes and federal or state governments could work together to create affirmative solutions,¹⁷⁰ and at least one has even characterized tribal comanagement as a reserved right.¹⁷¹ There are also several existing consultative models, including the IBMP and the Columbia River Fisheries Management Plan, but neither of these processes have achieved as much progress as hoped, and the IBMP has even fallen short of the level of progress mandated and agreed to in the Record of Decision that created the plan.

Thus, regardless of the model chosen for government-to-government consultation and comanagement processes, it is in everybody's interest to find a way to make progress on protecting fish and wildlife populations and the habitat on which they depend. Failing that, tribes will have no choice but to continue litigating their treaty rights, including an affirmative right to habitat and population protection. Allowing tribes to affirmatively assert their rights—rather than forcing them to sue state and federal governments when they violate those rights—seems like the least Uncle Sam can do to uphold his past promises.

¹⁷⁰ See, e.g., Kari Krogseng, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 27 ECOLOGY L.Q. 771 (2000); Wilkinson, *supra* note 44.

¹⁷¹ Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement As A Reserved Right*, 30 ENVTL. L. 279 (2000).